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## Privileges or Immunities Clause: Its Hour Come Round at Last, The Chapter 2

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## 2. The Privileges or Immunities Clause: “Its Hour Come Round at Last”?

*by Philip B. Kurland*

PROFESSOR ALLEN: *Ladies and gentlemen; our procedure for the rest of the morning will be something like this. We'll hear next from Professor Kurland, then we will call upon Professor Wechsler to comment on both of the morning papers, and we will complete the morning session with an opportunity for questions and discussion from the floor.*

*The second paper of the morning is given by Professor Philip Kurland, Professor of Law at the University of Chicago Law School. Professor Kurland is a graduate of the University of Pennsylvania and of the Harvard Law School. He was president of the HARVARD LAW REVIEW and law clerk to Mr. Justice Frankfurter, a circumstance which has been a significant factor in his career, both from the point of view of his admirers and his detractors. Professor Kurland is one of the most acute and devastating commentators on our constitutional law. He is the author of numerous volumes, including studies of the establishment clause of the first amendment, the jurisdiction of the Supreme Court, the Warren Court, and is the editor of the papers of Mr. Justice Frankfurter. He is the author of phenomenal and slashing book reviews, and I want to make it quite clear that Professor Kurland has found one book which he liked. The review was written in his very early and impressionable years. The fact of the matter is that Professor Kurland is very largely a fraud. He has a public image which is surely of the hard-boiled school but I have the great advantage of having seen Mr. Kurland in the domestic parlor being completely dominated by four lovely women, his wife and three beautiful girls, any one of whom would be fully capable of handling him, but the combined power of those four women in the Kurland household is a sight to behold. I emphasize these human aspects of Professor Kurland because they may not be apparent in what he is about to say.*

*Professor Kurland will address us on “The Privileges or Immunities Clause: ‘Its Hour Come Round at Last’?”*

PROFESSOR PHILIP B. KURLAND: *I must say when I was first invited to speak here I had a feeling of fear and trepidation as soon as I learned I was going to be introduced by Professor Allen and commented on by Professor Wechsler, or the other way around. In any event I knew I was in trouble. I knew I was in trouble also because I have appeared on the same platform with Professor Karst before. Despite his urging this morning I hope at least in your judgment of what is to go on here you will apply one law of your own.*

*Turning and turning in the widening gyre  
The falcon cannot hear the falconer;  
Things fall apart; the center cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and everywhere  
The best lack all conviction, while the worst  
Are full of passionate intensity . . .  
And what rough beast, its hour come round at last,  
Slouches toward Bethlehem to be born?*

W. B. Yeats, *The Second Coming*

It ought not to be surprising that a symposium concerned with celebrating the hundredth anniversary of the fourteenth amendment should concentrate, as the three other papers here in fact do, on the equal protection clause. Certainly equal protection of the laws has been at the heart of the developing constitutional jurisprudence of the last two decades. Certainly, too, for the same reason, a similar celebration of the fiftieth or seventy-fifth anniversaries of the fourteenth amendment would have focused on the due process clause.

I would not, if I could, detract from the importance of the theses of my fellow participants by suggesting that anything has yet happened in the decisions of the Supreme Court, the prime arbiter of the meaning of the fourteenth amendment, that should cause us to turn our attention away from the conceptions of equality that in recent years have been the most potent, if not the most cogent, forces in giving new meaning to the basic text.

What I propose here is to indulge, at the invitation of my hosts, I would quickly add, the most hazardous and least justifiable of activities that can be undertaken by a law professor: ruminations about the dis-

tant future. It is exactly because law—and especially constitutional law—is so far from a science, that prognostication is the least justifiable and most hazardous of activities for a law professor. Small as is the expertise that anyone can claim as a constitutional scholar, that claim is best rested on analysis of what has occurred rather than prediction of what will occur. Political scientists may reduce problems to statistical data and so manipulate the future as well as the past. So, too, perhaps, can the “new breed” of constitutional lawyers. But it ill behooves one brought up in the tradition of Thomas Reed Powell and Felix Frankfurter, names long out of fashion in the groves of academe, to look into his crystal ball and pretend to derive knowledge therefrom. Nevertheless, with a courage—like much courage—that is born of ignorance, my thesis in essence is that at the next noteworthy anniversary of the fourteenth amendment, it will be the privileges or immunities clause, placed first among section one’s grand restraints on government, that will be the center of attention. That clause, as you all know, reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

I would remind you immediately—not that it has made any difference to the Supreme Court—that only the privileges or immunities clause speaks to matters of substance; certainly the language of due process and equal protection does not.

### I. LOOKING BACKWARD

It is often helpful, if you want to know where you are going, to look back to see where you have been and to look around to see where you are. In the case of the fourteenth amendment’s privileges and immunities clause, however, the landscape in all directions seems barren of distinguishing features.

Naturally, the thought comes that we might determine the intent and function of the clause by resort to the legislative history that brought it into existence. This helps us only to know that the language may be traced back to the fourth article and from there back to the Articles of Confederation.<sup>1</sup> But in those documents they were addressing the rights of citizens of the states rather than of the United States.

The legislative history of this provision of the amendment in Congress is otherwise about as revealing as the legislative history of the equal protection clause. By that I mean that it affords a license to take

anything from it that the interpreter wishes to put in it. If recent scholarship on the fourteenth amendment has revealed anything, it has revealed that in this area truth, like beauty, lies in the eyes of the beholder. The primary rules for construction are two: (1) The language does not mean what it says. (2) The language does not say what it means. With these tools at hand, the conclusion is readily reached that any clause was intended to have the broadest effect or that it was intended to have no effect at all.

The proposition for this form of constitutional interpretation has been put most felicitously by Charles Fairman in his recent book on the history of the Supreme Court. There, relying on Celsus, Kent, Marshall, and Taney, Professor Fairman wrote:

To know the laws, it was written of old, is not merely to hold to their words, but to comprehend as well their force and power. A peculiar wisdom is needed to expound the *Constitution*—a charter intended to endure for ages to come and to be adequate to the unfolding needs of a nation. Its underlying *reason* may govern situations not present to the mind when the text was framed; the particular application with which a general provision was identified at the outset should not so limit its future operation as to produce a public inconvenience—notably when this would deny that perfect equality of rights among citizens which the Constitution contemplates . . . .<sup>2</sup>

This means that there is leave for the present generation to give such meaning to constitutional provisions as may not be interdicted by the specificity of the language. Thirty-five years of age may be difficult to manipulate as a qualification for presidential office. But due process, privileges or immunities, equal protection of the laws are phrases without any intrinsic limitations.

Probably the most significant legislative history with reference to the privileges or immunities clause may be found in the attempt by Senator Reverdy Johnson to strike it from the proposed amendment. He said:

I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it quite objectionable to provide [the privileges and immunities clause], simply because I do not understand what will be the effect of that.<sup>3</sup>

Again, Professor Fairman admirably summed up the situation:

Johnson's opposition is not to be classed with that of Garrett Davis, a wrangler, nor even with that of Senator Hendricks. Johnson saw

constitutional provisions as they would appear at the Supreme Court bar. He had participated in the Joint Committee, he had heard Howard's presentation—and he still did not understand what the effect of the clause would be. Coming from him, that amounted to a certificate that, for the purposes of litigation, the privileges and immunities clause did not have a definite meaning.<sup>4</sup>

With legislative history as a guide, the privileges or immunities clause took the form of a blank check. But, it quickly turned out, it was a blank check drawn on an account without funds.

The judicial history of the privileges or immunities clause is almost as uninforming as is the legislative history. For the most part, it tells us what the privileges or immunities are *not* rather than what they are. Although some think the judicial history should begin with *Crandall v. Nevada*,<sup>5</sup> it must be recognized that the decision preceded the effectuation of the fourteenth amendment by several months.<sup>6</sup> And in any event, the Court did not, in establishing the freedom of the United States citizen from restraints on travel by way of an exit tax, rely upon the language of the fourteenth amendment. The commencement of the judicial history of privileges or immunities of citizens of the United States lies in the *Slaughter-House Cases*,<sup>7</sup> which provided both a beginning and an end.

Mr. Justice Bradley, it will be recalled, was a “new boy” when he sat on the case on circuit. He saw the privileges or immunities clause in rather grandiose proportions. Indeed, he wrote of the origins of the privileges or immunities clause (much as Professor Bickel<sup>8</sup> was later to write of the origins of the equal protection clause):

The new prohibition that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” is not identical with the clause in the constitution which declared that “the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.” It embraces much more.

It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be pre-

sumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.

What, then, are the essential privileges which belong to a citizen of the United States, as such, and which a state cannot by its laws invade? It may be difficult to enumerate or define them. The supreme court, on one occasion, thought it unwise to do so. [Conner v. Elliot] 18 How. [59 U.S.] 591. But so far as relates to the question in hand, we may safely say it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit . . . .

. . . .

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.<sup>9</sup>

The reading given by Bradley sounds like question begging, because it speaks of “lawful employment in a lawful manner” and the question how lawfulness is to be determined is unresolved. But that is true of many of our grand constitutional propositions. Bradley meant that the federal courts, not the states, should determine what is lawful and what is not lawful on such criteria as they would adduce from time to time and from case to case.

The case was argued in the Supreme Court, as it had been in the circuit court, by John A. Campbell, a former Justice of the Supreme Court who had resigned when his home state of Alabama seceded from the Union. Part of the argument is instructive because the conditions it describes are closer to our own times than to those of the post-Civil War era. According to the reporter:

The learned counsel quoting Thiers, contended that “the right to one’s self, to one’s own faculties, physical and intellectual, one’s own brain, eyes, hands, feet, in a word to his soul and body, was an incontestable right; one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away. More than this, the obligation to labor was a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family.” Quoting further from Turgot, De Tocqueville, Buckle, Dalloz, Leiber, Sir G. C. Lewis, and others, the counsel gave a vivid and very interesting account of the condition and grievances of the lower orders in various countries of Europe, especially in France, with its *banalités* and “*seigneurs justiciers*,” during those days when “the prying eye of the government followed the butcher to the shambles and the baker to

the oven;" when "the peasant could not cross a river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor fill his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil, or cider at his own press;" the days of monopolies; monopolies which followed men in their daily avocations, troubled them with its meddling spirit, and worst of all diminished their responsibility to themselves.<sup>10</sup>

Campbell then pushed for the most expansive of readings for the fourteenth amendment in general and the privileges or immunities clause in particular. He would have read it as a nationalization of the existing federalism:

The doctrine of the "States-Rights party," led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. According to their theory the United States had no integral existence except as an incomplete combination among several integers. The fourteenth amendment struck at, and forever destroyed, all such doctrines. It seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several "integers" into a consistent whole. Were there Brahmans in Massachusetts, "the chief of all creatures, and with the universe held in charge for them," and Soudras in Pennsylvania, "who simply had life through the benevolence of the other," this amendment places them on the same footing. By it the national principle has received an indefinite enlargement. The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified. The amendment embodies all that the statesmanship of the country has conceived for accommodating the Constitution and the institutions of



the country to the vast additions of territory, increase of the population, multiplication of States and Territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development. It is an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government—that they might mutually sustain, support, and co-operate for the promotion of peace, security and the assurance of property and liberty. . . .

To the State governments it says: “Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;” nor law to deprive them of their life, liberty, property, or protection without trial. To the people the declaration is: “Take and hold this your certificate of status and of capacity, the Magna Charta of your rights and liberties.” To the Congress it says: “Take care to enforce this article by suitable laws.”<sup>11</sup>

The Supreme Court made short shrift of Campbell’s arguments on behalf of an expansive interpretation of the privileges or immunities clause of the fourteenth amendment. It held that rights of national citizenship, as distinct from state citizenship, were few: the express limitations of the Constitution, such as the rule against *ex post facto* laws; the right to travel expressed in *Crandall*; the claim on the protection of the national government while on the high seas or in foreign countries; the right of assembly and to petition for redress of grievances; the privilege of habeas corpus; the right to access to navigable waters; rights created by treaty; and such rights as were otherwise guaranteed by the thirteenth, fourteenth, and fifteenth amendments, including the right to state citizenship by bona fide establishment of residence in a state.

The one thing that was clear to Mr. Justice Miller, who wrote on behalf of a bare majority of five, was that it was not “intended to bring within the power of the Congress the entire domain of civil rights heretofore belonging exclusively to the States.”<sup>12</sup> “We are convinced,” he wrote, “that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.”<sup>13</sup>

Mr. Justice Field wrote for a minority including Chief Justice Chase, and Justices Swayne and Bradley. These three of Abraham Lincoln’s appointees and one of Grant’s were prepared to catalogue some of the

privileges and immunities intended to be protected and to generalize about others. The list Field derived from the Civil Rights Act included the rights: "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property."<sup>14</sup> The more general, Field took from an interpretation given to the fourth article in *Corfield v. Coryell*,<sup>15</sup> where Mr. Justice Washington, on circuit, said that he had "no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . ."<sup>16</sup> These included "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."<sup>17</sup>

Of these events, Professor Corwin has appropriately written: "Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a 'practical nullity' by a single decision of the Supreme Court rendered within five years after its ratification."<sup>18</sup> If the clause is in repose, it is not yet dead. However little invoked, acknowledgments of its authority have not infrequently been made. In *Twining v. New Jersey*,<sup>19</sup> itself but one of the many opinions overturned by the Warren Court, the Court was able to list among the privileges and immunities of national citizenship: the right of passage from state to state; the right to petition Congress to redress grievances; the right to vote for national officers; the right to enter public lands; the right to be protected against violence while in the custody of the government; the right to inform the United States about violations of its laws. One can add to these, depending on how one reads *Hague v. CIO*,<sup>20</sup> the right to use public parks and streets for peaceable assembly, a right that has long since been taken over by the first amendment as applied to the states through the fourteenth; and possibly the right to own property, depending on how one reads *Oyama v. California*.<sup>21</sup>

For the most part, the Supreme Court decisions since *Slaughter-House* have rejected attempts to invoke the privileges or immunities clause of the fourteenth amendment. In 1935, Mr. Justice Stone, as he then was, dissenting in *Colgate v. Harvey*,<sup>22</sup> which was overruled

five years later,<sup>23</sup> said: "Since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause."<sup>24</sup> Many of the decisions, however, like those rejecting claims to a right to jury trial and against poll taxes, have since been made obsolete by rulings that other provisions of the Constitution protect what is not protected by the privileges or immunities clause.

## II. CAUSES OF QUIESCENCE

With this knowledge of the history of the privileges or immunities clause comes the challenge to explain its failure to provide a base for substantial constitutional developments. The essential answer must be that it has failed because other provisions and events have succeeded in accomplishing what might have been the functions of this clause.

If, as was the case with some of the Radicals of the reconstruction era, it was hoped that the provisions of the privileges or immunities clause of the fourteenth amendment would nationalize the law by removing from the states to the national government the regulation of the affairs of American citizens, that function has long since been accomplished by other means. Federalism is dead, if by federalism we mean the retention by the states of areas of government in which they are sovereign. Thus, the grandest of the ambitions for the clause has been attained without it.

If one saw the privileges and immunities clause as a means to establish a constitutional doctrine of *laissez-faire* with regard to industrial and commercial activities, that too was accomplished, for an era, but through the due process clause. What Justice Field and his minority failed to secure by way of the privileges or immunities clause in the *Slaughter-House Cases*, Field and his henchman certainly accomplished by way of due process decisions in the years immediately following the *Slaughter-House* decision.

The privileges or immunities clause might have been read in narrow compass to assure the dominance of federal judicial and legislative power. But if its function was to assure the dominance of those rules made by the national courts and by the Congress that created privileges and immunities, the supremacy clause proved adequate to that task.

It has been cogently argued that the incorporation theory, by which the privileges and immunities of the several provisions of the Bill of

Rights have been made applicable to the states, would have most logically been accomplished by use of the privileges or immunities clause. After all, what better definition of national privileges and immunities than those specified as protections for its citizenry against the national government itself? It is possible that for some the clause was deemed inhospitable because by its language it confined its protection to citizens, while the equal protection clause and the due process clause afford sanctuary for all persons, including corporations, which the Supreme Court had specifically held to be outside the ambit of the privileges or immunities clause. As we all know, incorporation of most of the first eight amendments has been accomplished, but without the need for reliance on the privileges or immunities clause.

To the extent that the privileges or immunities clause might have afforded a base for equality of treatment of citizens, black and white, one of the arguments proffered in *Slaughter-House*, the equal protection clause has, especially in recent years, proved more than adequate.

Finally, the need for protection against national government action beyond that specifically provided in the Bill of Rights could not be found, by its terms, in the privileges or immunities clause which is directed only toward restraints on the states rather than the national government. The Court has, therefore, apparently thought it better to rely on the penumbræ of the first eight amendments, or even the amorphousness of the ninth, rather than resort to the privileges or immunities clause as a means for defining the rights of national citizenship vis-à-vis the national government itself. The Court, it should be noted, has not been wholly consistent in this regard. It managed to incorporate the equal protection clause, also limited to restraint of the states, within the due process clause of the fifth amendment.<sup>25</sup> It might equally have—and may yet—make privileges or immunities of national citizenship a limitation on the national government in the same way.

### III. RECENT STIRRINGS

Perhaps the only certain content of the privileges or immunities of national citizenship is what has come to be known as the right to travel, between states and within them. This right was specifically encompassed in the language of the Articles of Confederation,<sup>26</sup> from there included by implication in the fourth article, from which it has travelled to the fourteenth amendment. This reading is confirmed by Justice Washington's opinion in *Corfield v. Coryell*<sup>27</sup> and by the Court's

opinion in *Twining v. New Jersey*.<sup>28</sup> It has been read into the holding in *Crandall v. Nevada*.<sup>29</sup> Four justices, Black, Douglas, Murphy, and Jackson, preferred the privileges or immunities clause over the commerce clause as the proper foundation for the right to travel in *California v. Edwards*.<sup>30</sup>

More recently, the claim to a right to travel was established against the national government by *Aptheker v. Secretary of State*,<sup>31</sup> where the Court rested its conclusion on the due process clause of the fifth amendment. Reference was not made to the analogous use of the fifth amendment's due process clause in *Bolling v. Sharpe*.<sup>32</sup> But it might have been.

The right to travel was again recognized by the Court in *United States v. Guest*,<sup>33</sup> this time to justify the imposition of criminal sanctions by the national government on individuals who interfered with other individuals' constitutional right to travel. Mr. Justice Stewart, speaking for the Court, said: "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."<sup>34</sup> He concluded: "Although there have been necessary differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists."<sup>35</sup> Mr. Justice Harlan, in a separate opinion both concurring and dissenting, did canvass the various bases for the right to travel. His conclusion was that the right to travel was indeed a constitutional one, but enforceable only against the state or national governments and not a right to be free from interference by other individuals.<sup>36</sup>

*Aptheker* and *Guest*, like *Crandall* and *Edwards*, dealt with the right to travel *simpliciter*, the right not to be inhibited in travel by requirements of improper conditions for the granting of a passport, by a tax, by a penalty on state immigration, by physical force even when exerted by individuals. A big step, a giant leap forward perhaps, was taken in *Shapiro v. Thompson*,<sup>37</sup> where the Court created a derivative right on the basis of the right to travel. Here the Court said that the right to travel was unconstitutionally inhibited by a one-year residency requirement for welfare recipients, a requirement imposed by the states with the approval and sanction of the national government. The deci-

sion purported to rest on the equal protection clause. Mr. Justice Harlan's contention that the right to travel between states could be asserted only against the states and not the national government was rejected. The Court did not say that there was a constitutional right to welfare, but it was only one step from doing so. And the means to that end was the right to travel, a central ingredient of the privileges and immunities of American citizens.

The implications of the *Shapiro* case were quickly picked up. Claims against the states in terms of their obligations to provide not only welfare, but education, voting privileges, and other services were framed in terms of the right to travel. This term of court, a Tennessee residency requirement for voting was held invalid as a violation of the constitutional right to travel.<sup>38</sup> To the extent that these expansive notions of the right to travel succeed, I submit, it means the quickening of the heretofore moribund privileges or immunities clause of the fourteenth amendment.

If the slogan "right to travel" becomes a substitute for both the words and the meaning of the Constitution, it will not be the first time that ritual will have replaced judgment and reason as guides to constitutional meaning. The Court in its behavior long anticipated the techniques of Madison Avenue. Most of you are too young to remember that "freedom of contract," language nowhere to be found in the fourteenth amendment, resolved more cases than any words ever used by the Founding Fathers or their constitution-writing successors. For, Mr. Justice Holmes to the contrary notwithstanding,<sup>39</sup> Herbert Spencer's *Social Statics* was in fact a part of our Constitution for a long period of our history. Judgment by slogan has not declined since those days of "substantive due process." Hard problems are disposed of by the Court even today by the incantation of verbal formulae. Just think of "one man, one vote"; "vague for voidness," as I have termed it; "chilling effect"; and "the freezing principle"; "fundamental right" and "compelling government interest." To these and the others may now be added the euphemism of "the right to travel," which may, indeed, become a euphemism for the applicability of the privileges or immunities clause of the fourteenth amendment.

#### IV. LOOKING FORWARD

Admittedly, the right to travel cases are but acorns from which oaks may be anticipated but only after long and tedious growth. My ex-

pectations for the privileges or immunities clause, however, are not based on the development of the law that has already begun. My prognosis rests rather on the existent and potential needs that the privileges or immunities clause may be able to meet.

The essential need for a new constitutional development, I submit, is dependent on the proposition that constitutional law is not a creator of society but a creature of it. American society is rapidly moving toward the condition in which individual judgments and actions govern less and less of our behavior and formal and informal governments secure more and more power over individual activities. We are, as recent litigation has already indicated, becoming a society of classes, even if not in the huge divisions of Marxist dogma. Lawsuits are now more and more concerned with the rights of classes, not individuals; of consumers, or women, or blacks, or the aged, or the young. In short, we are on the road back from contract to status. Concomitant with this, government is assuming more and more power over, and responsibility for, the creation and distribution of goods and services. More and more an individual has no choice but that which the government makes available to him. The kind of society to which the former Mr. Justice Campbell pointed in horror in his argument in *Slaughter-House* is upon us, for better or worse and perhaps even for good. Moreover, we have arrived at the stage of technological development that Orwell so graphically described in his, to me, still shocking novel, *1984*. The problem of freedom is essentially the problem of avoiding the consequences of that technology so that Orwell's vision might, despite our technological achievements, be frustrated.

With government in control of so many essentials of our life, where in the Constitution can we turn for haven against the impositions of *1984*? Until now, we have looked to the Bill of Rights, substantive due process, and substantive equal protection. But nowhere in these provisions is there a basis for claims to privileges and immunities that will become more and more necessary. With all due respect to those who have labored so hard in the vineyard, *equal* educational opportunity is not the essence of the claim. It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one. The claim that will have to be developed will be a claim to adequate and appropriate educational opportunity. And this, I submit, derives more cogently from concepts of privileges and immunities rather than equality of treatment. So, too, with the

budding claim of right to what has heretofore been known as welfare services, health services, police protection, and a myriad of other goods and services of which the government, national, state, and local, has control directly or indirectly. These, too, are claims which, I think, will best be stated in terms of the privileges and immunities of citizens. Even “women’s lib” is more likely to find support in privileges and immunities than in the new constitutional amendment, which is more likely to succor men than women. But most of all, I should hope to find among the privileges and immunities of citizenship, that most fundamental of rights, still without a base in the Constitution, the right that Mr. Justice Brandeis called, “the right to be let alone.”<sup>40</sup>

The objections to the use of the privileges or immunities clause—its limitation to claims against states and its limitation to protection of citizens—have already been overcome. *Aptheker* and *Bolling v. Sharpe* and *Shapiro v. Thompson* have shown how the national government may be called on to respond to claims which the fourteenth amendment in terms makes only against state action. The equal protection clause has already required that classifications be rationalized so that differences in treatment between aliens and citizens would have to be particularly justified.

If I read the political scene correctly, the Supreme Court and company, to use Paul Freund’s phrase,<sup>41</sup> is the lone element of national government committed to the individual. Although or because it is non-representative, it is not responsible to the groups and classes that make up the constituencies of the legislative and executive branches of government and of the so-called independent agencies as well. It is the judiciary, therefore, that will be called upon, sooner or later, to define and protect the rights, privileges, and immunities of citizens in a highly organized service state. I am far from certain that it will turn to the privileges or immunities clause to bring about the results that it will command. But there the clause is, an empty and unused vessel which affords the Court full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses. In short, if the legislative and executive discretion is to be limited by the Constitution on such matters as public education, public welfare, and public housing; police, fire, and sanitation; ecology; and, to repeat, most importantly, with reference to the right of privacy, I expect it will come as an attempt to define the privileges or immunities of American citizenship.



In *Edwards v. California*, Mr. Justice Jackson wrote:

This clause was adopted to make United States citizenship the dominant and paramount allegiance among us. The return which the law had long associated with allegiance was protection. The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: "Take heed what thou doest; for this man is a Roman." I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of declaring in the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."<sup>42</sup>

With all due respect to Professor Karst, I hope that, in Mr. Justice Jackson's terms, we are Romans all.